president has only made some conjectural remarks about the absence of the first defendant at the time judgment in default was given against himself.

My attention was drawn to the case of *Safety Insurance Co. Ltd.* v. *Hua Seng Electric Co.*[1] Each case has got to be decided on its own particular facts and in my view that case is very easily distinguished from the present case. I do not consider it necessary to refer to any authorities for the purposes of this appeal except to follow the observations of the Court of Appeal in the case of *Foo Chiew Fong* v. *Guriman*[2] where Mathew C.J. delivering the judgment of the Court of Appeal said:

"Courts prefer that cases should be decided on their merits and do not invoke procedural rules to prevent a defendant from defending an action unless the defendant has no merits in his application for a postponement. The learned judge on appeal would have regarded the defendant's application with greater favour had he disclosed his defence at the time he applied for a postponement. But that consideration is not in my view material, as it was not an application to set a default judgment aside, in which case he must disclose an issue to be tried...."

In the present case the defence of the first defendant raised questions of law which it was the duty of the court to determine if the action was to be decided on merits. All that the first defendant was required to do was to show a good cause for his absence in court on the 6th January 1970 and his application being an application to set aside a default judgment to refer to his defence. This he did. In exercising their discretion it is the duty of the courts to exercise that discretion judicially, that is in accordance with commonsense and in doing so should bear in mind all that may promote justice and not defeat it. If discretion is exercised otherwise, it may only tend to strike at the root of justice or result in injustice being done. I am furthermore of the view that every opportunity should be given to the litigants to put forward their cases and that they have a right to be heard within the limits prescribed by law if they do not violate any of the principles of procedure that the law has laid down. They have a right to be heard and it is the function of the courts to see that no unnecessary shackles are put on them by such rules of procedure which empower the courts to exercise the discretion one way or the other especially if one of the parties concerned can be adequately compensated by costs.

I am of the view that the learned president did not exercise his discretion in a judicial manner and what he did was in fact in complete disregard of the evidence he had before him and which alone he was supposed to consider. In view thereof I will allow this appeal with costs to be paid by the respondent to the appellant. The plaintiff/respondent will, however, have the costs of the application which the first defendant made before the learned president and those costs will be assessed by the learned president in accordance with the provisions of the Second Schedule to the Subordinate Courts Rules.

Appeal allowed.

Solicitors: *Tay Leong Siak & Co.; Devadas & Co.*

ABDUL WAHAB v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) May 29, 1970]

[Malacca — Criminal Appeal No. 10 of 1970]

Criminal Law and Procedure — Trial — Sentence — Power of magistrate to award full punishment for offence of which a person has been convicted — Courts Ordinance, 1948, s. 87(2).

Penal Code, s. 457 — House-breaking in order to commit theft — Record of previous convictions — Sentence — Full punishment authorised by law.

The appellant had been convicted under section 457 of the Penal Code for having committed house-breaking in order to commit theft. He had twelve previous convictions. The learned magistrate sentenced him to 2 years' imprisonment and six strokes of the rattan to be followed by twelve months of police supervision.

Held: (1) the learned magistrate should have acted under section 87(2) of the Courts Ordinance which gives power to a first class magistrate to award the full punishment authorized by law for the offence of which a person has been convicted;

(2) in this case the term of imprisonment should be increased to 10 years.

Cases referred to:-

(1) *Public Prosecutor* v. *Viran* [1947] M.L.J. 62.

(2) *Sultan bin Rahmansa* v. *R.* [1955] M.L.J. 75.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent

Sharma J. (delivering oral judgment): The appellant in this case was charged under section 457 of the Penal Code for having committed house-breaking in order to commit theft. The accused pleaded guilty after having fully understood the nature and consequences of his plea. According to the charge, he entered into the house in question by scaling its back wall between the hours of 1.30 a.m. and 6.30 a.m He not only committed house-breaking but, after having gained entry into the house, committed theft of certain articles belonging to the occupant of the house, the total value of which as given by the prosecution was $1,415.

The appellant had 12 previous convictions the first of which was while he was a juvenile and the offence committed by him then was one under section 380 of the Penal Code. He continued his record of committing thefts up to the year 1950 when he was put under police supervision. He seems to have ignored even the provisions of law which govern the conduct of a police supervisee. I need not go into the other convictions which disfigure and display the character of the appellant to an extremely ugly and detestable degree but I need only mention that on the 8th day of June 1961 he was convicted in Singapore under section 457 of the Penal Code and sentenced to 5 years' imprisonment. He got out of the prison and was again convicted in 1966 for house-breaking under section 456 of the Penal Code and sentenced to 2 years' imprisonment.

The learned magistrate convicted the appellant and sentenced him to 2 years' imprisonment and six strokes of the rattan to be followed by 12 months of police

supervision. Under section 87(1) of the Courts Ordinance a magistrate is empowered to pass any sentence not exceeding 2 years' imprisonment, a fine of $5,000 and whipping up to six strokes, or any sentence which combines any of the sentences aforesaid. In passing sentence on the appellant with his previous record the learned magistrate seems to have done what he thought he was empowered to do up to the maximum extent under the law. But I think the learned magistrate apparently seems to have made a mistake there. Section 87 of the Courts Ordinance was amended by the Courts (Amendment) Ordinance 1953 (Ordinance No. 49 of 1953) whereby sub-section (2) to section 87 of the Courts Ordinance was added. This sub-section reads as follows:

"Notwithstanding the provisions of sub-section (1), where a First Class Magistrate has convicted any person and it appears that, by reason of any previous conviction or of his antecedents, a punishment in excess of that prescribed by sub-section (1) of this section should be awarded, then such First Class Magistrate may award the full punishment authorised by law for the offence of which such person has been convicted and shall record his reason for so doing."

Before dealing with section 87(2) of the Courts Ordinance and the omission of the learned magistrate to have regard to the provisions of that sub-section, I think it is my duty to make it known that in cases like this and in the interests of the community, the prosecution ought, having regard to the previous criminal record and history of the accused, to see that he is charged in a proper court where he can be properly and adequately dealt with. The magistrate before whom the charge is brought is not entitled to have a record of the previous convictions of the accused until after the accused has been convicted, but the investigating officer and all those responsible for the prosecution of the accused cannot be said not to possess the right or not to have that knowledge if investigations are carried out properly.

There is provision under section 177 of the F.M.S. Criminal Procedure Code which corresponds to section 188 of the Straits Settlements Criminal Procedure Code for a magistrate to transfer the case to a court of some higher jurisdiction if it appears at any stage of the proceedings that from any cause the case is one which ought to be tried by a court of higher jurisdiction than that of his own. The same section also entitles the Public Prosecutor to make an application during the trial to stay proceedings and to have the case transferred to a higher court or to have a preliminary enquiry with a view to committal to the High Court. In this connection I may refer to only two cases. In the case of *Public Prosecutor* v. *Viran*[1] Spenser-Wilkinson J. in delivering the judgment said at page 65:

"Finally a point was raised as to whether under section 177 a district judge has power to transmit a case to a magistrate for preliminary inquiry or whether he is under obligation to proceed himself with the preliminary inquiry with a view to committal of the accused. The section lays down that the magistrate is to transfer the case to a higher court or to proceed himself under Chapter XVII. I think this point is covered by section 34(ii) of the Courts Ordinance, 1946, which provides that the practice and procedure shall accord with the provisions of the existing laws but shall be applied with such modifications as are necessary to make them applicable to the courts established under the Ordinance or to any judge, magistrate or officer thereof. The only way in which a district judge can transfer the case to a court of higher jurisdiction than his own is by way of preliminary inquiry. Under section 177, therefore, he can either transfer by sending the case to a magistrate or himself proceed under Chapter XVII of the Criminal Procedure Code."

In a subsequent case, *Sultan bin Rahmansa* v. *Regina*[2] Spenser-Wilkinson J. said:

"It is well established that a magistrate's court has no power to transfer a case to a higher court for sentence and this is in substance what the learned magistrate purported to do. Having heard the case to its conclusion it was in my opinion his duty himself to deal with the appellant according to law. The power given to a magistrate's court by the proviso to section 85 of the Courts Ordinance, 1948 must be exercised, if it is exercised at all, before the magistrate has come to a conclusion upon the guilt or otherwise of the accused. It must be remembered that in a summary trial the court has to come to a conclusion at the close of the case for the prosecution as to whether or not the case has been made out which would warrant a conviction. In my opinion, therefore, it is improper for a magistrate to exercise the power of transfer once he has called upon the accused for his defence. It has been held that a magistrate must have before him some material upon which to come to a conclusion that the case is one proper to be transferred to a sessions court (see *Public Prosecutor* v. *Viran*[1]); but in the great majority of cases it should be apparent to a magistrate whether or not the case is one which he could adequately deal with if a conviction resulted by the time he has heard the main story of the prosecution which will usually be contained in the complainant's evidence."

Section 177 of the F.M.S. Criminal Procedure Code reads as follows:

"In any trial before a magistrate in which it *appears at any stage* of the *proceedings* that from any cause the case is one which in the *opinion* of such magistrate ought to be tried by some court of higher jurisdiction than his own... the magistrate shall stay proceedings and transfer the case to such higher court or proceed under Chapter XVII with a view to the committal of the accused for trial by the court of a judge, and shall record such order upon the proceedings." (The emphasis is mine.)

I do not think it is necessary for me at all for the purposes of this appeal to go into the question whether the passing of a sentence is a stage in the proceedings and at what stage in the trial the magistrate is empowered under section 177 of the F.M.S. Criminal Procedure Code to form the opinion that the case ought to be tried by some court of higher jurisdiction.

In view of the provisions of section 87(2) of the Courts Ordinance I am of the view that the magistrate was empowered to pass the maximum sentence provided under section 457 of the Penal Code. I have already asked the appellant why the sentence should not be enhanced. He has only told me that his complaint against the sentence passed by the learned magistrate relates only to that part of the order which says that he should receive six strokes of the rattan. I do not think in the circumstances of this case that the learned magistrate exercised his powers or erred in the exercise of his discretion when he imposed a sentence of six strokes of the rattan. This he was clearly entitled to do under section 87(1) of the Courts Ordinance. The appellant has given me no satisfactory explanation or put forward any reasonable plea why the sentence of imprisonment should not be enhanced in this case. I am of the view, looking at the previous history of the appellant and his whole criminal record right from his childhood days, that he has proved himself in-

corrigible. A great part of his adulthood has been spent in prison and it may perhaps do the society some good if he is kept away from the public. I therefore set aside the order of the learned magistrate and substitute therefor a sentence of 10 years' imprisonment and six strokes of the rattan followed by 12 months' police supervision. I would have preferred to put him under a longer police supervision but as this is an appeal which is by way of a retrial I am of the view that I should not impose upon him a punishment higher than what the learned magistrate could have imposed, or subject him to such period of police supervision which the learned magistrate could not have lawfully subjected him to. I vary that part of the order of the learned magistrate which relates to 2 years' imprisonment and substitute therefor a term of imprisonment for 10 years and this I do in view of the provisions of section 87(2) of the Courts Ordinance, which I think the learned magistrate failed to take into account. The rest of the order of the learned magistrate will remain effective and unaltered.

The legislature enacted section 87(2) of the Courts Ordinance to meet the situation where an offence is committed by an accused with a very bad record. It was a most proper case in which the learned magistrate should have exercised his powers under that subsection.

Order accordingly.

LEE KONG YIN v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) June 11, 1970]

[Malacca — Criminal Appeal Nos. 17 and 18 of 1969]

Criminal Law and Procedure — Trial — Statement of accused from dock — Accused making unsworn statement — Trial court allowing prosecution counsel to make submission on statement but not allowing defence counsel to do so — Improper exercise of discretion — Criminal Procedure Code (Cap. 21), ss. 5 and 184.

In this case the appellant was charged under section 409 and 477A of the Penal Code and was found guilty and convicted by the learned president. The accused had made a statement from the dock and produced no witnesses. The defence counsel thereupon addressed the court and began to comment and deal with the statement his client had made from the dock. The prosecuting officer objected to the right of the defence to comment on that statement and the learned president upheld the objection. He however allowed the prosecuting officer, despite the objections of defence counsel, to make his submissions on the statement.

Held, allowing the appeal and ordering a retrial: the learned president had a discretion, to allow the defence counsel to make a submission on the statement of the accused, but in this case he did not exercise the discretion judicially or on sound principles. The refusal by the learned president to the defence counsel to address the court in a matter on which the learned president allowed the prosecution to address him appeared to be unjust on the face of it and was not a proper exercise of discretion by the learned president. The conviction must therefore be quashed and a retrial ordered.

Cases referred to:-

(1) *Public Prosecutor* v. *Sanassi, ante* p. 198.

(2) *Wong Heng Fatt* v. *Public Prosecutor* [1959] M.L.J. 20.

(3) *Manickam* v. *R.* [1948] M.L.J. 185.

(4) *Lam Heng* v. *R.* [1937] M.L.J. 154.

(5) *Chow Kwan* v. *Public Prosecutor* [1943] M.L.J. 64.

(6) *R.* v. *Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256.

(7) *Vinayak Laxman Bhatkande* v. *Emperor* A.I.R. 1928 Bom. 557.

(8) *Hurry Churn Chuckerbutty* v. *Empress* I.L.R. 10 Cal. 140.

(9) *Mahindar Singh* v. *Public Prosecutor* [1941] M.L.J. 230.

CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Abdullah bin Ngah (Senior Federal Counsel) for the respondent.

Sharma J. (delivering oral judgment): The appellant was charged under sections 409 and 477A of the Penal Code and found guilty and convicted by the learned president who sentenced him to six months' imprisonment on each charge. It is not necessary to deal with the merits or otherwise of the various grounds of appeal. I have heard the counsel for the parties only on one ground and the appeal could be dealt with on the preliminary point raised by the appellant.

The accused made a statement from the dock when he was asked to enter on his defence and he produced no witnesses. The learned president having taken down the statement of the accused from the dock, the defence counsel started with his submissions and began to comment on and deal with the statement his client had made from the dock. The prosecuting officer objected to the right of the defence to comment on that statement and the learned president upheld the objection. The prosecuting officer began making his submissions and now the defence counsel objected to the prosecuting officer dealing with or commenting on the unsworn statement of the accused made from the dock. The defence counsel's objection was over-ruled and the learned president allowed the prosecuting officer to comment on the statement of the accused from the dock.

I have already held in *Public Prosecutor* v. *Sanassi*[1] that a statement made by an accused from the dock is not evidence, although the court has to consider such a statement for whatever it is worth. The accused cannot be called a "witness" in the strict sense of the word as the statement he makes is not made on an affirmation. The learned president was referred to the authority of *Wong Heng Fatt* v. *Public Prosecutor*[2] where Smith J. held that the accused had no right to make any submission if he chose to make a statement from the dock. In that case reliance was placed upon the wording of section 174 of the Criminal Procedure Code (F.M.S.) which for convenience I will read out:

"In summary trials under this Chapter —

(i) The officer conducting the prosecution need not open the case but may forthwith produce his evidence.

(ii) When the accused is called upon to enter on his defence, he or his advocate may before producing his evidence open his case stating the facts or law on which he